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The remaining assignment of error is to the action of the trial court in permitting B. Lowenberg and Pine Beach Hotel Corporation to participate as creditors in the restored promoter's profits.

While the corporation is entitled to recover from the promoter the amount of profits which he has made out of the secret agreement, we know of no rule of law or of equity which deprives him as a creditor of the corporation for money actually advanced by him in carrying on its business from sharing in its assets along with its other creditors.

We are of opinion that there is no error in the decree appealed from, and that it should be affirmed.

Affirmed.

CARDWELL, J., absent.

LAMBERT *v.* PETERS.

June 17, 1909.

[64 S. E. 1135.]

Error to Circuit Court of City of Richmond. Action by R. L. Peters against G. W. Lambert. There was a judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

Wm. L. Royall, for plaintiff in error.

John A. Lamb, for defendant in error.

BUCHANAN, J. This case was heard with the case of *Lambert v. Phillips & Son*, 64 S. E. 945 (15 Va. Law Reg., p. 321), upon the same record, and involves the same questions. For the reasons stated in the opinion in that case, handed down at this term of the court, the judgment in this case must be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not in conflict with the views expressed in that opinion.

SUTHERLAND *v.* COMMONWEALTH.

June 17, 1909.

[65 S. E. 15.]

1. **Statutes (§ 241*)—Construction—Penal Statutes.**—Penal statutes must be construed strictly against the state and favorably to the liberty of the citizen.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. § 241.* 12 Va.-W. Va. Enc. Dig. 771; 4 Id. 11.]

2. **Weapons (§ 10*)—Carrying Concealed Weapons—Acts Not Constituting Offense—"About the Person."**—The purpose of Acts 1908, p. 381, c. 259, providing that "if any person shall carry about his

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

person, hid from common observation, any pistol, * * * he shall be fined," etc., is to interdict the practice of carrying a deadly weapon about the person, concealed, and yet so accessible as to permit prompt and immediate use, and the words "about the person" must mean that it is so connected with the person as to be readily accessible for use or surprise if desired, and hence a pistol in a scabbard and in a pair of saddlebags with the lids down, though the bags be in the hand, does not fall within the language of the statute.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 9; Dec. Dig. § 10.* 13 Va.-W. Va. Enc. Dig. 686.

For other definitions, see Words and Phrases, vol. 1, pp. 28, 29.]

3. Criminal Law (§ 13*)—Necessity of Offense Coming Within Spirit and Letter of Statute.—An action, to constitute an offense, must come within the spirit and letter of the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.* 4 Va.-W. Va. Enc. Dig. 11, et seq.]

Appeal from Circuit Court, Dickinson County.

One Sutherland was convicted of carrying a concealed pistol, and he appeals. Reversed.

S. H. Sutherland, for appellant.

William A. Anderson, Atty. Gen., for the Commonwealth.

HARRISON, J. In this case the accused was charged with unlawfully carrying about his person a pistol which was concealed from common observation.

The evidence in support of this charge is that the accused placed a pistol, incased in its scabbard, in a pair of saddlebags, pulled the lids of the saddlebags down, hiding the pistol from view, and carried the saddlebags in his hand down the road until out of sight.

The question presented is whether or not it is a violation of the statute against carrying concealed weapons for a man to carry in his hand a pair of saddlebags containing a pistol, which is hidden from common observation.

So much of the statute as is necessary to the consideration of this question is in these words: "If any person carry about his person hid from common observation, any pistol, * * * he shall be fined not less than \$20.00 nor more than \$100.00." Acts 1908, p. 381, c. 259.

This is a penal statute, and it is an ancient maxim of the law that all such statutes must be construed strictly against the state and favorably to the liberty of the citizen. The maxim is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the Legislature, and not in the judicial department.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

No man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute which imposes such penalty. There can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute. If these principles are violated, the fate of the accused is determined by the arbitrary discretion of the judges, and not by the express authority of the law. *Harris v. Com.*, 81 Va. 240, 59 Am. Rep. 666; *Lascallett v. Com.*, 89 Va. 878, 17 S. E. 546; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37.

In the light of this fundamental rule of construction, we are of opinion that the question raised by this record must be answered in the negative. The purpose of the state was to interdict the practice of carrying a deadly weapon about the person, concealed, and yet so accessible as to afford prompt and immediate use. "About the person" must mean that it is so connected with the person as to be readily accessible for use or surprise if desired. A pistol in a scabbard and in a pair of saddlebags, with the lids down, though the saddlebags be in the hand, does not fall within the language of the statute, which says: "If a person carry about his person hid from common observation any pistol," etc.

Evidence that the defendant had a pistol concealed under a rug in the bottom of the buggy in which he was riding was held not to be sufficient to convict him of carrying a pistol concealed about his person. *Ladd v. State*, 92 Ala. 58, 9 South. 401.

Evidence that the defendant had a pistol concealed in saddlebags while riding along the public road was held not to be sufficient to convict him of carrying a pistol concealed about his person. *Cunningham v. State*, 76 Ala. 88.

The act of which the accused stands convicted in this case does not come within the spirit, and certainly not within the letter, of the statute, which it must do.

As said by Chief Justice Marshall in *U. S. v. Wiltberger*, supra: "It would be dangerous indeed to carry the principle that a case, which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of a kindred character with those which are enumerated."

If the statute be less comprehensive than the Legislature intended, it is for that body to extend its operation, and not for the courts to do so.

The judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with this opinion. Reversed.

Note.

See editorial in September number, ante, p. 391.